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In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, ET AL., PETITIONERS

v.

CLEBURNE LIVING CENTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether classifications drawn on the basis of mental retardation are subject to heightened judicial scrutiny under the Equal Protection Clause.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Introduction and summary of argument	5
Argument:	
Classifications on the basis of mental retardation do not violate the Equal Protection Clause so long as they are rationally related to a legitimate state interest	11
A. Heightened scrutiny is not appropriate where members of a class possess special needs and abilities that are relevant to proper governmental choices	11
B. Because mentally retarded persons have distinctive needs and abilities that may properly be taken into account by the legislature, classifications drawn on the basis of retardation are not inherently invidious	17
C. Heightened scrutiny is not supported by other relevant considerations	22
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Board of Education v. *Rowley*, 458 U.S. 176	19, 23
Brown v. *Sibley*, 650 F.2d 760	24
California Ass'n of the Physically Handicapped, Inc. v. *FCC*, 721 F.2d 667, cert. denied, No. 83-2069 (Oct. 1, 1984)	2, 24
City of New Orleans v. *Dukes*, 427 U.S. 297	11
Cospito v. *Heckler*, 742 F.2d 72	1
Craig v. *Boren*, 429 U.S. 190	13, 23
Doe v. *Colautti*, 592 F.2d 704	21, 25

Cases—Continued: Page

Edge v. *Pierce*, 540 F. Supp. 1300 ..... 2, 21
F. S. Royster Guano Co. v. *Virginia*, 253 U.S. 412 .. 11
Fowler v. *United States*, 633 F.2d 1258 ..... 2, 25
Frontiero v. *Richardson*, 411 U.S. 677 .....9, 14, 15, 24
Graham v. *Richardson*, 403 U.S. 365 12
Halderman v. *Pennhurst State School & Hospital*, 446 F. Supp. 1295 24
Korematsu v. *United States*, 323 U.S. 214 12
Lindsey v. *Normet*, 405 U.S. 56 26
Macon Ass'n for Retarded Citizens v. *Macon-Bibb County Planning & Zoning Comm'n*, No. 84-156 (Oct. 1, 1984) 24
Massachusetts Board of Retirement v. *Murgia*, 427 U.S. 307 .....9, 14, 16, 24-25
Mathews v. *Lucas*, 427 U.S. 495 15
McLaughlin v. *Florida*, 379 U.S. 184 ..... 11, 16
Mississippi University for Women v. *Hogan*, 458 U.S. 718 ..... 16, 19
Parham v. *Hughes*, 441 U.S. 347 12
Pennhurst State School v. *Halderman*, 451 U.S. 1 .. 19
Pickett v. *Brown*, No. 82-5576 (June 6, 1983) 13
Plyler v. *Doe*, 457 U.S. 202 .....11, 13, 17, 25
San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 .....11, 12, 13, 14, 23
Schweiker v. *Wilson*, 450 U.S. 221 1
Slaughter-House Cases, 83 U.S. (16 Wall.) 36 11
Strauder v. *West Virginia*, 100 U.S. 303 12
Tigner v. *Texas*, 310 U.S. 141 17
TVA v. *Hill*, 437 U.S. 153 ..... 7, 12
United States v. *Carolene Products Co.*, 304 U.S. 144 7
United States v. *Lovett*, 328 U.S. 303 7
Upshur v. *Love*, 474 F. Supp. 332 25
Vance v. *Bradley*, 440 U.S. 93 12
Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 25
Village of Belle Terre v. *Boraas*, 416 U.S. 1 25
Weber v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 11
Youngberg v. *Romeo*, 457 U.S. 307 .....18, 20, 25

Constitution, statutes and regulation: Page

U.S. Const. Amend. XIV:
Due Process Clause 18, 20
Equal Protection Clause ..... *passim*
Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.* 2
Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq.* 5, 18, 22
42 U.S.C. 6010(1) 19
42 U.S.C. 6010(2) 19
Education of the Handicapped Act, 20 U.S.C. 1400 *et seq.* 5, 19, 22
20 U.S.C. 1400(c) 23
20 U.S.C. 1412(1) 23
20 U.S.C. 1412(5)(B) 19
Elementary and Secondary Education Act of 1965, 29 U.S.C. 2701 *et seq.* 22
Housing Act of 1959, § 202, 12 U.S.C. 1701q 2, 21
Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*:
§ 7, 29 U.S.C. 706 24
§ 504, 29 U.S.C. 794 ..... 2, 5, 18, 22
42 U.S.C. 1382 19
42 U.S.C. 1391-1394 19
Mentally Retarded Persons Act of 1977, Tex. Stat. Ann. art. 5547-300 (Vernon) 5, 19
20 C.F.R. 416.934 19

Miscellaneous:
Comment, *Can the Mentally Retarded Enjoy "Yards That are Wide?"*, 28 Wayne L. Rev. 1349 (1982) 22
Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969) 15, 16
J. Ely, *Democracy and Distrust* (1980) 12, 23, 24
Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972) 13
S. Herr, *Rights and Advocacy for Retarded People* (1983) 20
Note, *Quasi-Suspect Classes and Proof of Discrimination*, 90 Yale L.J. 912 (1981) 24

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INTEREST OF THE UNITED STATES

A number of federal statutes and programs draw distinctions based on mental impairment and other handicaps. It is in the interest of the United States that rational legislative and administrative judgments in these areas not be invalidated. In *Schweiker* v. *Wilson*, 450 U.S. 221 (1981), for example, in the course of supporting an aspect of the Supplemental Security Income program, we argued that classifications affecting institutionalized mental patients should be scrutinized under the rational-basis test. See also, *e.g.*, *Cospito* v. *Heckler*, 742 F.2d 72 (3d

Cir. 1984) (administration of federal benefits programs); *California Ass'n of the Physically Handicapped, Inc.* v. *FCC*, 721 F.2d 667 (9th Cir. 1983), cert. denied, No. 83-2069 (Oct. 1, 1984) (application of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) to licensed broadcasters); *Fowler* v. *United States*, 633 F.2d 1258 (8th Cir. 1980) (federal employment classification drawn on the basis of mental retardation); *Edge* v. *Pierce*, 540 F. Supp. 1300 (D.N.J. 1982) (provision of public housing under Section 202 of the Housing Act of 1959 (12 U.S.C. 1701q)). The scope of the Attorney General's enforcement authority under the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997 *et seq.*) will also be affected by the decision in this case.

STATEMENT

1. Cleburne Living Centers, Inc. (CLC) leased a house at 201 Featherston Street in the City of Cleburne, Texas, which it intended to use as a group home for thirteen mentally retarded adults (Pet. App. C5). The City's zoning ordinance requires that a special-use permit be obtained for operation of any " 'hospitals for the insane or feeble-minded, or alcoholic or drug addicts, or penal or correctional institutions' " (*id.* at C6-C7 (emphasis omitted)). Following a public hearing, CLC's application for a special-use permit was denied by the City Council, which considered the following factors in reaching its decision (*id.* at C7):

> 1. the attitude of a majority of owners of property located within two hundred (200) feet of 201 Featherston;
>
> 2. the location of a junior high school across the street from 201 Featherston;

3. concern for the fears of elderly residents of the neighborhood;

4. the size of the home and the number of people to be housed;

5. concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;

6. the home's location on a five hundred (500) year flood plain; and

7. in general, the presentation made before the City Council.

2. Following the denial of its application, CLC brought this action in the United States District Court for the Northern District of Texas, alleging that the zoning ordinance, on its face and as applied, contravenes the Equal Protection Clause.[1] The district court rejected this challenge after a bench trial (Pet. App. A1-A22). The court reasoned that "mental retardation is not a suspect or quasi-suspect class promoting strict or heightened judicial scrutiny" and concluded that, under the rational-basis standard, "the ordinance, both as written and applied, passes constitutional muster" (*id.* at A17). The requirement of a special-use permit and its denial here, the court found, were rationally related to the City's legitimate concerns over the location of group housing for retarded adults (*id.* at A17-A18).

3. A panel of the court of appeals reversed (Pet. App. C1-C26). The court held that mentally retarded persons constitute a "quasi-suspect" class for purposes of the Equal Protection Clause, requiring "heightened" or "intermediate" judicial scrutiny of classifications affecting them (*id.* at C16). Although

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[1] CLC was joined by its vice-president and two advocacy organizations. Statutory and other constitutional claims rejected or not addressed below are not presented in this Court.

it recognized that "mental retardation * * * *is* a relevant distinction in some cases," the court found that a "combination of * * * historical prejudice, political powerlessness, and immutability" with respect to mental retardation requires heightened scrutiny (*ibid.* (emphasis in original)). Applying this standard to the facts before it, the court concluded that the ordinance is unconstitutional both on its face and as applied. The panel assumed that the City's asserted legislative purposes are substantial, but found that the ordinance is not sufficiently tailored to achieving those goals. *Id.* at C19-C25.

Over the dissent of seven of its fifteen sitting judges, the court of appeals denied the City's suggestion for rehearing en banc (Pet. App. D1-D6). Judge Garwood, joined by five other dissenters, criticized the panel's determination that mentally retarded persons constitute a quasi-suspect class. He noted that "[w]here difference in treatment should rationally be expected, it is indeed an ill-advised rule that treats its presence as quasi-suspect" (*id.* at D2), and urged (*ibid.*):

> where fundamental rights are not concerned, a threshold requirement for scrutiny beyond the rational basis level should be that the group singled out for special treatment be not generally, or with respect to the field of regulatory subject matter under consideration, significantly different, as a result of its defining characteristics, from the rest of society in terms of its needs and abilities to function.

Because "[t]he characteristics which define the retarded as a class * * * bear heavily on the individual's needs and abilities to perform or contribute to society over an extremely wide range of functions,

and are highly relevant to proper legislative goals in most respects" (*id.* at D3), Judge Garwood concluded that the proper inquiry under the Equal Protection Clause is whether the challenged classification is rationally based.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Congress and many states, including Texas, have acted with increasing levels of commitment not only to protect the handicapped generally and mentally retarded persons in particular, but also affirmatively to make available significant resources to care for their special needs. See, *e.g.*, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6000 *et seq.*); Education of the Handicapped Act (20 U.S.C. 1400 *et seq.*); Mentally Retarded Persons Act of 1977 (Tex. Stat. Ann. art. 5547-300 (Vernon)). Against this background of widespread federal and state solicitude for the special needs of mentally retarded persons, the court below erred in the standard it applied to test a determination under a particular local ordinance regarding the appropriate location of one group residence home for retarded adults.

There is no showing here that the state is acting systematically and invidiously to disadvantage mentally retarded persons in respect to their needs—including the need for shelter. More important, mental retardation is a characteristic that appropriately invokes specialized and distinctive governmental responses. Accordingly, decisions about the location of particular facilities for mentally retarded persons should invoke only the residual level of judicial scrutiny appropriate in all cases where a challenge is made to the choice of one group's concerns com-

pared with those of others: did the governmental action bear a rational relation to a legitimate governmental goal.

We are not concerned here with the correctness of the district court's conclusion that such a rational basis exists in this case—indeed we readily concede that, if this case is remanded to the court of appeals for consideration under what we urge is the appropriate constitutional standard, that court may well supportably conclude that the denial of a special-use permit in this case was so wanting in rationality as to fail to pass muster under the Equal Protection Clause of the Fourteenth Amendment.

Our sole concern is with the erroneous and novel determination of the court of appeals that the action of the City of Cleburne under the questioned ordinance should be tested by some more exigent standard of review. The City's actions—actions hardly likely to enlist anyone's sympathies—should not become the occasion for announcing a significant new doctrine, which would intensify the measure of substantive federal judicial oversight of governmental actions by extending it to a category that is not only numerous in itself but that, once admitted, is conceptually difficult to contain.

2. When government embarks on a program of national defense, the claims of education and welfare may suffer. When government undertakes through price supports to maintain the incomes of small family farmers, the interests of consumers and urban workers may suffer. Money spent on remedial education is not available for programs for the gifted. Money spent on arts education is unavailable for science. And the point extends beyond the competition for fiscal resources—the development of our natural resources and the expansion of industry com-

pete with concerns for the environment and wilderness areas. It is the essence of democracy that allocation of limited resources be the subject of public determination in the political arena.[2] See, *e.g.*, *TVA* v. *Hill*, 437 U.S. 153, 194-195 (1978); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153 & n.4 (1938). Every time some aspect of this domain of choice is constitutionalized—however justifiably—a price is paid: there is a corresponding withdrawal from the arena of democratic politics of some portion of the debate about our common political life.

The judiciary's constitutional mandate to discern and restrain legislative actions that have as their overt or covert purpose harm to innocent individuals (*e.g.*, *United States* v. *Lovett*, 328 U.S. 303 (1946)) or groups (*e.g.*, *United States* v. *Carolene Products Co.*, *supra*)—particularly the weak, the disadvantaged and the despised—must be set against this general background of democratic values. In every instance the central task for a reviewing court is to distinguish between such abuses of government power and those legitimate actions that may reasonably be seen simply as instances of the inevitable, sometimes painful choices between competing legitimate ends.

Classifications that disadvantage persons by reason of their race are the paradigm of the invidious, to which the Fourteenth Amendment was directly and

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[2] Many knowledgeable persons have asserted that community living arrangements are not only less expensive than alternatives but less burdensome to the community in every respect. To the extent that this is so, the basis for justifying the challenged zoning decision here in terms of a rational allocation of benefits and burdens is correspondingly weak. See pages 10, 22, *infra*.

historically addressed, and which still provide the principal focus of judicial concern. Where distinctions are made on the basis of race, the historical record, the strong factual and moral imperative of the unity and equality of all mankind, and the explicit positive directive of the Fourteenth Amendment itself rightly place the heaviest burden of justification on governmental action. Thus strict scrutiny is not simply a talismanic phrase nor an explanation frozen through repetition into a dogma. It is the sensible and natural expression of our nation's skepticism that racially disadvantaging governmental action is ever likely to have a benign purpose, an expression that such action is overwhelmingly likely to be moved by or rooted in impermissibly invidious and derogatory aims.

The contrast to this case is striking. Mentally retarded persons are, undeniably, entitled to individual rights and liberties and to equal treatment before the law. But unlike members of racial minorities, mentally retarded individuals are different from others in respect to their needs and capacities. If, as decency requires, government is to attend to such persons at all, it must attend to and be cognizant of those differences. In the absence of proof that the state is now seeking systematically to disadvantage mentally retarded persons in the totality of its programs and indeed where a combined state and federal regime responsive to the needs of retarded persons is in place, heightened judicial scrutiny of the particular resource allocation decisions among communities and neighborhoods can only invite the judiciary's own recasting of the political balance between one set of worthy claims and another.

Thus, the court of appeals erred in concluding that mentally retarded persons constitute a "quasi-sus-

pect" class for purposes of equal protection analysis. Because there is plainly a relationship between membership in the class and an individual's needs and abilities, legislative classifications drawn on the basis of mental retardation cannot be deemed inherently invidious. See *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). It would be inconsistent with the purpose of the Equal Protection Clause and the institutional province of the courts to subject such classifications to heightened scrutiny. Where they are rationally related to legitimate governmental purposes, statutes providing differential treatment for mentally retarded persons must be upheld.

3. But are mentally retarded persons not special, in greater need of judicial protection from the vagaries of the political process? Certainly, as we acknowledge at the outset, they are a class that invokes our justified concern and sympathy. But that is a far cry from creating yet another group enabled to compel heightened scrutiny of legislative actions affecting their interests. Petitioners argue that mentally retarded individuals, far from being adversely stereotyped, have been the beneficiaries of extraordinary solicitude in recent years (see Pet. Br. 19-22). The court of appeals' view, on the contrary, is that they have been the victims of historical contempt and negative stereotyping (Pet. App. C3, C13-C14).

Doubtless both contentions are correct. And that is just the point. Many groups have at various times and places been the subject of just such ambivalent social attitudes—victims of cancer, for example, and blind people, the unemployed, and bankrupts. The presence of such ambivalence—all by itself or even coupled with a certain political vulnerability, for the ambivalence may often create just that vul-

nerability—cannot catapault a class of persons into a position where they enjoy the special protection of the judiciary against political actions that appear to (or do) disfavor them relative to some other group. More is needed to justify heightened scrutiny, and that something extra is the *absence* of significantly differentiating needs and capabilities. For these differentiating features are just what necessitate and thus justify distinctive legislative responses to persons in these categories. And once government responds specially to such special needs, it will always be the case that it could have done more.

To be sure, even where this predicate exists for making frequent and pervasive distinctions based on the special needs and characteristics of a group like physically handicapped or mentally retarded persons, such distinctions may in a particular case be the cover for invidious hostility to a disfavored group, rather than a choice among competing legitimate ends. (It is entirely possible, indeed, that this very case represents such an irrational and invidious choice, a discrimination that cannot pass the residual general test of rational relationship.) It is as a brake on this aberrational abuse of government power that courts retain the residual authority to strike down laws that disadvantage some without a rational nexus to a proper governmental goal. This is the kind of scrutiny under the Equal Protection Clause that must of necessity be appropriate to the vast domain of governmental action—of necessity, because otherwise the Equal Protection Clause would drive the judiciary into the role of generally recasting the balance of burdens and advantages that is the stuff of all political decision.

ARGUMENT

CLASSIFICATIONS ON THE BASIS OF MENTAL RETARDATION DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE SO LONG AS THEY ARE RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST

A. Heightened Scrutiny Is Not Appropriate Where Members Of A Class Possess Special Needs And Abilities That Are Relevant To Proper Governmental Choices

"The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.' " *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982), quoting *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). In applying this command, the Court has accorded state and local legislation a presumption of validity, generally requiring "only that the classification challenged be rationally related to a legitimate state interest." *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976); see, *e.g.*, *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). More "searching judicial scrutiny" is required only where laws "create suspect classifications or impinge upon constitutionally protected rights." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 40 (1973). Suspect classifications and infringements on fundamental rights will be invalidated unless they are "precisely tailored to serve a compelling governmental interest." *Plyler*, 457 U.S. at 217.

1. The primary objective of the Equal Protection Clause is, of course, to prohibit official racial discrimination. *E.g.*, *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). The Fourteenth Amendment recognizes the history of such discrimination in this

country as well as a moral truth: an individual's race is normally irrelevant to the achievement of any legitimate state interest. See, *e.g.*, *Strauder* v. *West Virginia*, 100 U.S. 303 (1880). Accordingly, race is the prototypical suspect classification subject to strict scrutiny under the Equal Protection Clause. See generally *Rodriguez*, 411 U.S. at 28; see also *Graham* v. *Richardson*, 403 U.S. 365 (1971) (alienage); *Korematsu* v. *United States*, 323 U.S. 214 (1944) (national origin).

Strict scrutiny is more than a mode of analysis—it embodies a theory of the proper institutional province of the courts. The majoritarian branches of government are vested with the authority and responsibility to allocate resources and in so doing to choose among competing worthy goals. Such is the essence of governing. Application of strict scrutiny to invalidate legislation is appropriate only where there is reason to believe that a court will be able correctly to discern those distinctions drawn by the majoritarian branches of government that are categorically invidious and not susceptible of correction through the democratic process. See *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979 ("[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted") (footnote omitted); *Parham* v. *Hughes*, 441 U.S. 347, 351 (1979) (plurality opinion); J. Ely, *Democracy and Distrust* (1980); cf. *TVA* v. *Hill*, 437 U.S. 153, 194-195 (1978). The Court has, accordingly, quite properly been reluctant to extend the category of suspect classes beyond the few instances where not only is the

need for protection from legislative discrimination undeniable but the judiciary's ability to distinguish invidiousness from legitimate policy judgment is also plain. See, *e.g.*, *Plyler*, 457 U.S. at 219 n.19 (illegal aliens not a suspect class); *Rodriguez*, 411 U.S. at 28 (wealth not a suspect class).

2. With respect to certain classifications, the Court has applied an "intermediate" or "heightened" level of scrutiny under the Equal Protection Clause. See *Plyler*, 457 U.S. at 217; Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972). Under this standard, a classifica- will pass muster only if it is substantially related to important governmental objectives. See, *e.g.*, *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). Such heightened scrutiny has been applied to classifications based on gender (*ibid.*) and legitimacy (*Pickett v. Brown*, No. 82-5576 (June 6, 1983), slip op. 6-7) and to the complete deprivation of education to undocumented alien children (*Plyler* v. *Doe*, *supra*). The Court has never afforded this level of equal protection scrutiny to mentally retarded persons or to any other group characterized by such a common handicap.

Identification of classes as "quasi-suspect" and so entitled to heightened protection must be informed by the same considerations of institutional competence that have characterized the delineation of the set of suspect classes. The category of quasi-suspect classes is properly quite limited—it cannot, consistent with the Equal Protection Clause, be expanded to give judicial protection to any group that arouses our sympathy and has failed to obtain all that it desires from the legislature. In deciding whether to apply

heightened scrutiny, the Court has regularly considered whether a particular group has suffered from a history of purposeful discrimination. See, *e.g.*, *Rodriguez*, 411 U.S. at 28. But the Court has also insisted—and rightly so—that a further condition be met before heightened scrutiny is justified: a legislative classification will invoke such scrutiny only if the basis for that classification is a characteristic that is irrelevant to the needs or abilities of the individuals being classified.

This Court has consistently pointed to an absence of any relationship between membership in a class and an individual's ability to perform in society as a central criterion for determining whether the class is suspect. In *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), for example, the plurality observed (*id.* at 686; emphasis added and footnote omitted):

> [W]hat differentiates sex from *such nonsuspect statuses as intelligence or physical disability*, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears *no relation to ability to perform or contribute to society.*

Similarly, in *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976), the Court rejected the assertion that age is a suspect classification, reasoning (*id.* at 313; emphasis added):

> While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been *subjected*

> *to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.*

And in *Mathews* v. *Lucas*, 427 U.S. 495 (1976), the Court applied heightened scrutiny to classifications drawn on the basis of illegitimacy because that characteristic "bears no relation to the individual's ability to participate in and contribute to society" (*id.* at 505). In summary,

> what distinguishes those characteristics [of suspect classifications] from others is the extreme unlikelihood that the legislature can ever justify the departure from * * * equality by showing what *that* particular trait has to do with merit.

Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1173-1174 (1969) (emphasis in original; footnote omitted), cited in *Frontiero*, 411 U.S. at 686 n.18.

Heightened scrutiny is appropriate, then, only where a particular classification is most unlikely to bear a reasonable relation to the distinctive needs or abilities of the members of the class. Such a rule is in keeping both with the historical foundations of the Equal Protection Clause and the institutional role of the courts within a government based on the constitutionally mandated separation of powers. Certain characteristics are irrelevant to the differential allocation of resources inherent in any legislative classification. There is almost never a good reason to distinguish on the basis of those characteristics, such as race, sex and legitimacy—characteristics that say nothing about an individual's needs and abilities. When the legislature imposes burdens on the basis of such irrelevant characteristics, it is fair to presume that its purpose is invidious or is based, not on

true differences, but on stereotypical generalizations reflecting improper normative judgments about the moral worth of certain groups. See generally *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 724-725 (1982); *McLaughlin* v. *Florida*, 379 U.S. at 191-193.

But legislative classification premised on factors that distinguish a class in a manner relevant to legitimate governmental interests and choices simply does not constitute the sort of purposeful discrimination that suggests an invidious legislative motive behind the classification. See *Murgia*, 427 U.S. at 312-314 (age not a suspect class). Where a plausible relationship between membership in the class and a proper legislative goal exists, courts will generally be ill-equipped to determine that statutes embodying the classification in question are truly invidious.[3] And without such a determination, a history of legislative classification standing alone cannot establish the sort of discrimination that the Fourteenth Amendment was intended to eradicate. Where a characteristic is relevant to governmental choices responding to differential needs and abilities, the appropriate role for the courts is to ensure that any challenged classification is rationally related to a legitimate governmental purpose. If so, the inquiry is at an end and the legislation must be upheld. See

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[3] Where, on the other hand, it is "highly implausible" that a correlation between membership in the class and a legitimate purpose exists, "stricter review is required to dispel the natural suspicion—buttressed by reason and experience—that whenever *that* trait is used to single out a group for unfavorable treatment, the state is applying penalties simply for the sake of penalties, with the accompanying suggestion of imputed inferiority." *Developments in the Law, supra*, 82 Harv. L. Rev. at 1175 (emphasis in original; footnote omitted).

generally *Plyler*, 457 U.S. at 216, quoting *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940) (" '[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same' ").

B. Because Mentally Retarded Persons Have Distinctive Needs And Abilities That May Properly Be Taken Into Account By The Legislature, Classifications Drawn On The Basis Of Retardation Are Not Inherently Invidious

The court of appeals erred in elevating the class of mentally retarded persons to "quasi-suspect" status for purposes of equal protection analysis. To be sure, mentally retarded individuals have been treated differently in the past and receive statutorily mandated distinctive treatment today. But classification on the basis of retardation does not in itself reflect invidiousness. Rather, the special needs and disabilities of those who are mentally handicapped are plainly relevant to a variety of legitimate legislative goals. Unlike suspect classes, mentally retarded persons *are* different in ways that may appropriately be taken into account by the legislature. They are entitled to enjoy substantive constitutional rights and to be accorded equal treatment. But heightened scrutiny is neither necessary nor consistent with the purpose of the Equal Protection Clause.

1. "[M]ental retardation is a problem of learning * * * manifested particularly in difficulty with abstract thinking, judgment, and problem solving and retention, but also includes [problems related to] social adjustment and economic productivity" (J.A. 37-38). Generally measured by IQ, the condition varies among individuals along a spectrum from mild

and moderate retardation to severe and profound retardation (*id.* at 38). Mild retardation is barely discernible on casual contact and mildly retarded individuals can become self-sufficient and productive members of the community. Many of those who are profoundly retarded, on the other hand, are wholly lacking in self-sufficiency and require life-long care. *Id.* at 39. See generally *Youngberg* v. *Romeo*, 457 U.S. 307 (1982).[4]

Persons who are mentally retarded have special needs and abilities, which quite properly elicit our sympathies. In addressing their distinctive problems, legislatures have of course been required to draw classifications based on mental retardation and its associated characteristics. The legislative response to mental retardation often has been to accommodate the special needs of class members while allowing for the limitations on their abilities.

The federal government has embarked on an ambitious program, embodied in a number of statutes, of protection of and assistance to retarded people. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) provides:

> No otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *.

Similarly, the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6000 *et seq.*) estab-

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[4] *Youngberg*, which recognized under the Due Process Clause of the Fourteenth Amendment certain liberty interests in involuntarily committed individuals, was not an equal protection case and, in any event, did not create a constitutional right to community treatment.

lishes a federal-state grant program and declares the congressional intent that persons with developmental disabilities receive "appropriate treatment, services, and habilitation," which "should be provided in the setting that is least restrictive of the person's personal liberty." 42 U.S.C. 6010(1) and (2). See generally *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 11-14 (1981). And the Education of the Handicapped Act (20 U.S.C. 1400 *et seq.*) provides that the federal government will assist the states in giving all handicapped children a free appropriate public education, and requires "mainstreaming," *i.e.*, that, "to the maximum extent appropriate, handicapped children * * * [be] educated with children who are not handicapped." 20 U.S.C. 1412(5)(B). See generally *Board of Education* v. *Rowley*, 458 U.S. 176, 179-184 (1982).[5]

2. The distinctive needs and abilities of mentally retarded persons set them apart from classes properly entitled to heightened judicial scrutiny. Unlike statutes drawn on the basis of race or sex or legitimacy, there is nothing inherently "suspect" or "quasi-suspect" about legislative classifications drawn on the basis of mental impairment. The court of appeals erred in concluding otherwise. Quite simply, mentally retarded persons *are* different in respects relevant to legitimate governmental choices—they do "suffer from an inherent handicap" (*Mississippi University for Women* v. *Hogan*, 458 U.S. at 725).

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[5] Mentally retarded persons also receive assistance under the Social Security Act. See, *e.g.*, 42 U.S.C. 1382, 20 C.F.R. 416.934 (disability benefits); 42 U.S.C. 1391-1394 (federal-state grant program to combat mental retardation). The State of Texas has also made a commitment to protecting and assisting mentally retarded persons. See Mentally Retarded Persons Act of 1977, Tex. Stat. Ann. art. 5547-300 (Vernon).

It would be surprising indeed to find the statute books empty of all mention of retardation. Nor would such a state of affairs be desirable, for those who are retarded or for anyone else. Because of the special needs and abilities of mentally retarded individuals, legislative choices may properly take mental retardation into account. Some persons may rate these choices as not sufficiently solicitous of the needs of retarded individuals. But, where the choices are rational ones and do not violate substantive norms, they are properly for the majoritarian branches of government, not for the federal judiciary. The bulwark of constitutional protection for mentally retarded persons, therefore, lies in the enforcement of their substantive rights under the Due Process Clause. See *Youngberg* v. *Romeo*, *supra*. And rational-basis scrutiny will also provide significant safeguards (see note 2, *supra*). Accordingly, a determination that heightened scrutiny does not apply would simply represent a sound interpretation of the Equal Protection Clause, not an abdication of judicial protection against majoritarian excess.

It may well be, as the court of appeals stated (Pet. App. C13), that not every classification affecting mentally retarded persons has been benign and that "[t]hey have been subjected to a history of unfair and often grotesque mistreatment." See generally S. Herr, *Rights and Advocacy for Retarded People* 9-29 (1983). Undoubtedly, certain forms of such mistreatment would not be countenanced under any level of equal protection scrutiny. But it is not for the courts to assess whether the bulk of legislation has benefitted or harmed retarded people or is otherwise sound public policy. Nor do instances of unfairness require heightened scrutiny where the classifica-

tion is relevant to legitimate governmental objectives.[6] See pages 14-16, *supra*.

Were classifications drawn on mental retardation to be subjected to heightened scrutiny under the Equal Protection Clause, it might well prove difficult to deny on a principled basis such an extra measure of judicial protection to other groups, such as physically handicapped, the infirm, and even those suffering from diseases such as alcoholism.[7] "Intermediate scrutiny" on behalf of "quasi-suspect" classes is in itself something of a departure from the historic foundations of the Fourteenth Amendment (see pages 11-13, *supra*). To expand this category to any group that enlists our sympathies is both insupportable and unwise.

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[6] Cf. *Doe* v. *Colautti*, 592 F.2d 704, 711 (3d Cir. 1979) ("Although the mentally ill have been the victims of stereotypes, the disabilities imposed on them have often reflected that many of the mentally ill do have reduced ability for personal relations, for economic activity, and for political choice. This is not to say that the legal disabilities have precisely fit the actual incapacities of the mentally ill individuals whom the law has burdened, but it is important that the legal disabilities have been related, even if imperfectly, to real inabilities from which many of the mentally ill suffer.").

[7] The court of appeals' decision, for instance, could place under the judiciary's heightened-scrutiny microscope the decision to make federally subsidized housing with specially adapted facilities available to the aged but not to the physically handicapped, to the physically handicapped but not to mentally retarded persons. See generally Section 202 of the Housing Act of 1959 (12 U.S.C. 1701q); *Edge* v. *Pierce*, 540 F. Supp. 1300 (D.N.J. 1982). In the best of all possible worlds each of these worthy groups would be amply accommodated. But the decision to accommodate some now and others later, some here and others there, cannot be allowed to become as a regular matter grist for the judicial mill.

Whether the City's ordinance, as written and as applied, satisfies the rational basis standard of scrutiny need not be addressed by this Court, but rather should be determined by the court of appeals on remand. We note that the federal government, for its part, is committed to the integration of mentally retarded people into community life. See, *e.g.*, Education of the Handicapped Act, 20 U.S.C. 1400 *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794; Elementary and Secondary Education Act of 1965, 29 U.S.C. 2701 *et seq.*; Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq.* But this federal policy commitment does not require judicial scrutiny under the Equal Protection Clause of state and local legislative judgments beyond what is consistent with the nature and purpose of that provision.

C. Heightened Scrutiny Is Not Supported By Other Relevant Considerations

1. The court of appeals also relied on a finding that "mentally retarded persons have lacked political power" in concluding that heightened scrutiny is appropriate (Pet. App. C14). While this may historically be correct, it does not justify heightened scrutiny in the face of the distinctive needs of retarded persons. Moreover, advocacy groups and family members have publicized the special needs of those who are retarded and legislatures and the public have responded. See generally Comment, *Can the Mentally Retarded Enjoy "Yards That are Wide?"*, 28 Wayne L. Rev. 1349 (1982), and sources cited therein. These advances have not merely protected mentally retarded persons from unfair treatment, but have led to the adoption of legislation designed to provide special as-

sistance to handicapped groups, including retarded persons. See pages 18-19, *supra*.

The court of appeals also erred in applying heightened scrutiny to a "large, diverse, and amorphous class." *Rodriguez*, 411 U.S. at 28. Mental retardation is among the most common of human handicaps. Approximately 125,000 persons born each year will be mentally retarded. As many as 6,500,000 individuals now living in the United States may properly be classified as mentally retarded. J.A. 40. Depending on the degree and type of retardation, there are significant differences among retarded persons in terms of their needs and their ability to function in society (*id.* at 39).[8] Accordingly, they are frequently treated differently according to the nature and extent of their disability; the Education of the Handicapped Act, for example, guarantees each handicapped child an "appropriate" education (20 U.S.C. 1400(c), 1412(1)) "tailored to [his] unique needs" (*Rowley*, 458 U.S. at 181).[9]

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[8] While retarded persons vary in their individual needs and abilities, even the trait of mild retardation will be significant for certain legitimate legislative goals. Hence, classifications with respect to retardation are not suspect on the ground that the characteristic is being used as a proxy for some other trait with which it is not adequately correlated. Compare *Craig* v. *Boren*, 429 U.S. at 199 ("[i]n light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact").

[9] While mental retardation, like suspect and quasi-suspect classes, is "immutable," that factor alone should not be sufficient to call for heightened scrutiny. See J. Ely, *Democracy and Distrust* 155 (1980) (immutability, while not irrelevant,

2. The decision below is contrary to relevant precedent in this Court as well as in the lower federal courts. In *Macon Ass'n for Retarded Citizens* v. *Macon-Bibb County Planning & Zoning Comm'n*, No. 84-156 (Oct. 1, 1984), the Court dismissed for want of a substantial federal question the Supreme Court of Georgia's application of the rational basis test to a zoning ordinance affecting the placement of group homes for mentally retarded persons. See 252 Ga. 484, 314 S.E.2d 218, 221 (1984). The plurality in *Frontiero* v. *Richardson*, *supra*, noted in dictum that classifications based on intelligence are not subject to strict scrutiny (411 U.S. at 686). In *California Ass'n of the Physically Handicapped, Inc.* v. *FCC*, 721 F.2d 667, 670 (9th Cir. 1983), cert. denied, No. 83-2069 (Oct. 1, 1984), the court of appeals expressly refused to apply strict scrutiny to a classification of handicapped individuals that included mentally retarded persons,[10] and applied rationality scrutiny instead. Similarly, in *Brown* v. *Sibley*, 650 F.2d 760 (5th Cir. 1981), the court held, with respect to a class that included mentally retarded persons, that "the only inquiry is whether [the] alleged classification scheme is 'rationally related to the [state agency's] objective'" (*id.* at 766, quoting *Murgia*,

"cannot be the talisman that some have tried to make it"). Immutability is not in itself associated with the sort of history of discrimination and political powerlessness that would make heightened scrutiny appropriate. See, *e.g.*, *id.* at 150 (no one has explained "*why* we should be suspicious of legislatures that classify on the basis of immutable characteristics") (emphasis in original); see also Note, *Quasi-Suspect Classes and Proof of Discrimination*, 90 Yale L.J. 912, 918 (1981).

[10] The class was defined by the Rehabilitation Act of 1973, 29 U.S.C. 706, which includes those suffering from mental retardation. See *Halderman* v. *Pennhurst State School & Hospital*, 446 F. Supp. 1295, 1323 (E.D. Pa. 1977).

427 U.S. at 315).[11] See also *Fowler* v. *United States*, 633 F.2d 1258, 1262 (8th Cir. 1980) (applying the rationality standard to classification involving mentally retarded persons); cf. *Doe* v. *Colautti*, 592 F.2d 704 (3d Cir. 1979) (mentally ill persons are not entitled to strict scrutiny); *Upshur* v. *Love*, 474 F. Supp. 332, 337 (N.D. Cal. 1979) (applying rational basis test to classification involving blind persons, reasoning that "a physical disability is far different from a characteristic such as race, which does not bear upon one's ability to perform").

3. Finally, the court of appeals erred in suggesting that heightened scrutiny is appropriate because the City's zoning ordinance "withholds a benefit which, though not fundamental, is very important to the mentally retarded" (Pet. App. C17). Retarded persons are entitled to enjoy substantive constitutional rights. See *Youngberg* v. *Romeo*, *supra*. But zoning decisions do not implicate the sort of rights calling for heightened scrutiny under the Equal Protection Clause. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 7-8 (1974); cf. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (zoning decision violates Equal Protection Clause where motivated by racially discriminatory purpose). The court of appeals' reliance on *Plyler* v. *Doe*, *supra*, is misplaced. In *Plyler*, the Court was confronted with the complete deprivation of education from school-age undocumented aliens, which created a "stigma of illiteracy [that] will mark [the children] for the rest of their lives" (457 U.S. at 223). Here, by contrast, the ordinance may not result in the total deprivation of a benefit, but rather

[11] By applying the rational basis standard, the courts of appeals in these cases implicitly rejected the contention that mental retardation is a quasi-suspect class.

requires that a special-use permit be obtained for the particular location chosen. If this requirement is used to discriminate without relation to legitimate goals, its application will rightly be struck down. But the mere fact that community-based living arrangements in general are important to mentally retarded individuals does not, in the absence of a suspect or quasi-suspect classification, require heightened judicial scrutiny. As the Court noted in *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972), in determining that the need for decent shelter is not a fundamental right giving rise to heightened scrutiny under the Equal Protection Clause, "[w]e do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill."

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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